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## Zerin Properties v Naza TTDI Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCvC)(W)-1059–05 OF 2018
ZALEHA YUSOF, YAACOB MD SAM AND LAU BEE LAN JJCA
19 JUNE 2019

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*Contract — Agency — Sale of land — Whether property managers had concluded contract with real estate agent to secure buyers for lands and buildings in development project — Whether course of conduct between parties estopped property managers from denying existence of concluded contract — Whether agent had proven it was effective cause in bringing about joint venture ('JV') between property managers and third party to develop parcel of land in the project — Whether agent's chain of causation in bringing about the JV remained unbroken despite expiry of its appointment as agent — Whether JV amounted to a sale as it involved payment of substantial sum by JV company to land owner to acquire the subject land for development — Whether agent entitled to be paid for work done/services rendered in bringing about JV under the Valuers, Appraisers and Estate Agents Rules 1986*

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The instant appeal was against the decision of the High Court dismissing the appellant's claim against the respondent for payment of RM6,237,792 in professional fees. The appellant, a licensed real estate agency, claimed the said sum for work done and services rendered in bringing about a joint venture between the respondent, a property development and management company, and a third party ('Hap Seng') to develop a plot of land ('Plot 5A') within the Kuala Lumpur Metropolis ('KL Metropolis') development area. On 5 February 2014, the respondent appointed the appellant for a year to be its agent to market for the sale of various plots of development land and office buildings within the KL Metropolis at an agreed agency fee of 1.5%. The appellant began discussing the matter with various potential purchasers/developers and kept the respondent posted with regular emails on the progress of its marketing work. Hap Seng, which had dealt with the appellant previously, responded positively and expressed keenness to take part in the development of KL Metropolis. The appellant arranged a meeting between Hap Seng and the respondent on 22 July 2014 to discuss the matter further. Following from the meeting, Hap Seng confirmed its interest to co-develop Plot 5A with the respondent. Thereafter, nothing transpired further between Hap Seng, the appellant and the respondent. About one year and five months later, the appellant discovered from media publications that the respondent's wholly-owned subsidiary, TTDI KL Metropolis Sdn Bhd ('TKMSB') and Hap Seng had formed a joint venture company ('Golden Suncity') to develop

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Plot 5A; that Hap Seng's wholly-owned subsidiary, Hap Seng Land Development Sdn Bhd had signed a shareholders' agreement with TKMSB and Golden Suncity, and that TKMSB had also signed a development rights agreement with Golden Suncity. The appellant demanded payment of professional fees from the respondent for work done in making the joint venture happen. The respondent denied that it had appointed the appellant or that it was liable to make any payment. The High Court dismissed the appellant's claim on the grounds that: (a) the appellant was not validly appointed, either expressly or impliedly, by the respondent as an agent to sell Plot 5A; (b) the appellant was not the effective cause of any sale; and (c) the joint venture to develop Plot 5A did not amount to a sale.

**Held:**

(1) The appellant was appointed expressly or through estoppel to market KL Metropolis which included Plot 5A. The respondent was estopped from denying the appellant's appointment as its agent in respect of the Plot 5A transaction albeit a joint venture. If the respondent was of the view that the appellant's services were no longer required, it would not have relied on the appellant's assistance to arrange for the crucial 22 July 2014 meeting or even bothered for the respondent's group managing director to attend the meeting. It could not be denied that the respondent had, through the conduct of its officers/representatives represented and/or encouraged the appellant to continue to pursue Hap Seng. Even if there was no express appointment, it was inequitable to deprive the appellant of its fees for work done in marketing KL Metropolis and the respondent was estopped from doing so (see paras 30 & 53(a)).

(2) The appellant had proved on balance of probabilities that it was the effective cause in bringing the respondent and Hap Seng together in the Plot 5A transaction and of the 'sale' of Plot 5A and there was no break in that chain of causation. The entry into the joint venture to develop Plot 5A amounted to a sale. The respondent was estopped by contract and conduct from asserting otherwise. If the respondent alleged that there was another effective cause, then it had the onus of proving the same. On the evidence, the respondent could not prove that between 13 August 2014 and 29 January 2016 any intervening event occurred as to cause a break in the chain of causation. The respondent was therefore entitled to its fees notwithstanding the expiry of the period of its appointment as agent (see paras 35, 39 & 53(b)–(c)).

(3) The mechanics of the Plot 5A transaction was a sale of Plot 5A to the jointventure company, Golden Suncity, for a consideration of RM467,834,400. The development rights agreement showed that the consideration was based upon a value of RM1,200 per square foot ascribed to Plot 5A by the contracting parties at the material time. The

Valuers, Appraisers and Estate Agents Rules 1986 in Schedule 7 under the heading of Estate Agency provided that the term 'Sale and Purchase' envisaged three categories of transactions, one of which was 'Fees for other services such as joint venture, sale of company, property swaps, etc'. The joint venture transaction in the present case fell within that category where the maximum chargeable scale fee was 3% on the value of the transaction (see paras 45–47).

(4) The most appropriate computation of damages (fees due) to the appellant was RM4,678,344, which was the preferred option submitted by the appellant. It was based on professional fees of 1.5% on 389,862 sqft (Plot 5A's area measurement as set out in the development rights agreement) based on a value of RM800 per square foot (see paras 51–52).

(5) The fact that it was TTDI KL Metropolis Sdn Bhd, and not the respondent, that entered into the joint venture did not vitiate the appellant's cause of action against the respondent as TTDI KL Metropolis Sdn Bhd was a wholly-owned subsidiary of the respondent. The respondent could not take advantage of a device to try to defeat an innocent party's claim and evade payment of commission. It was inequitable for the respondent to refuse to pay the appellant's fees (see para 50(c)).

**[Bahasa Malaysia summary**

Rayuan ini adalah terhadap keputusan Mahkamah Tinggi menolak tuntutan perayu terhadap responden untuk bayaran RM6,237,792 untuk yuran profesional. Perayu, sebuah agensi hartanah berlesen, mendakwa jumlah wang tersebut untuk kerja-kerja yang dilakukan dan perkhidmatan yang diberikan dalam usaha membawa usahasama antara responden, syarikat pembangunan hartanah dan pengurusan, dan pihak ketiga ('Hap Seng') untuk membangunkan plot tanah ('Plot 5A') di kawasan pembangunan Kuala Lumpur Metropolis ('KL Metropolis'). Pada 5 Februari 2014, responden melantik perayu untuk satu tahun untuk menjadi ejennya untuk memasarkan penjualan pelbagai plot tanah pembangunan dan bangunan pejabat di KL Metropolis dengan bayaran agensi yang dipersetujui sebanyak 1.5%. Perayu mula membincangkan perkara ini dengan pelbagai pembeli/pemaju yang berpotensi dan sentiasa memberitahu responden dengan emel biasa mengenai kemajuan kerja pemasarannya. Hap Seng, yang telah merujuk kepada perayu sebelum ini, memberi maklum balas positif dan menyatakan hasrat untuk mengambil bahagian dalam pembangunan KL Metropolis. Perayu mengatur satu mesyuarat antara Hap Seng dan responden pada 22 Julai 2014 untuk membincangkan perkara itu selanjutnya. Berikutan dari mesyuarat itu, Hap Seng mengesahkan minatnya untuk bersama membangunkan Plot 5A dengan responden. Selepas itu, tiada apa yang berlaku lagi antara Hap Seng, perayu dan responden. Sekitar satu tahun dan lima bulan kemudian, perayu mendapati dari penerbitan media bahawa anak syarikat milik penuh

responden, TTDI KL Metropolis Sdn Bhd ('TKMSB') dan Hap Seng telah membentuk syarikat usaha sama ('Golden Suncity') untuk membangunkan Plot 5A; bahawa anak syarikat milik penuh Hap Seng, Hap Seng Land Development Sdn Bhd telah menandatangani perjanjian pemegang saham dengan TKMSB dan Golden Suncity, dan bahawa TKMSB juga telah menandatangani perjanjian pembangunan hak dengan Golden Suncity. Perayu menuntut pembayaran yuran profesional daripada responden untuk kerja yang dilakukan dalam membuat usaha sama berlaku. Responden menafikan bahawa ia telah melantik perayu atau bahawa ia bertanggungjawab membuat apa-apa bayaran. Mahkamah Tinggi menolak tuntutan perayu atas alasan bahawa: (a) perayu tidak dilantik secara sah, sama ada secara nyata atau tersirat, oleh responden sebagai ejen untuk menjual Plot 5A; (b) perayu bukan punca nyata bagi mana-mana jualan; dan (c) usahasama untuk membangunkan Plot 5A tidak berjumlah jualan.

**Diputuskan:**

(1) Perayu dilantik secara nyata atau melalui estopel untuk memasarkan KL Metropolis yang termasuk Plot 5A. Responden telah diestopkan daripada menafikan pelantikan perayu sebagai ejennya berkenaan dengan urus niaga Plot 5A walaupun usahasama. Sekiranya responden berpendapat bahawa perkhidmatan perayu tidak lagi diperlukan, ia tidak akan bergantung pada bantuan perayu untuk mengatur pertemuan penting 22 Julai 2014 atau malah mengambil peduli untuk pengarah kumpulan pengurusan responden untuk menghadiri mesyuarat. Tidak dapat dinafikan bahawa responden telah, melalui perlakuan pegawai/wakilnya yang diwakili dan/atau menggalakkan perayu untuk terus mengejar Hap Seng. Sekiranya tidak ada pelantikan nyata, adalah tidak munasabah untuk melupuskan perayu yurannya untuk kerja-kerja yang dilakukan dalam pemasaran KL Metropolis dan responden diestopkan daripada berbuat demikian (lihat perenggan 30 & 53(a)).

(2) Perayu telah membuktikan atas keseimbangan kebarangkalian bahawa ia adalah punca nyata dalam membawa responden dan Hap Seng bersama-sama dalam urus niaga Plot 5A dan 'penjualan' Plot 5A dan tidak ada pemecahan dalam rantaian penyebab itu. Kemasukan ke dalam usahasama untuk membangunkan Plot 5A berjumlah jualan. Responden telah diestopkan dengan kontrak dan kelakuan daripada menegaskan sebaliknya. Sekiranya responden mendakwa bahawa terdapat satu lagi punca nyata, maka ia mempunyai tanggungjawab membuktikan yang sama. Dengan keterangan itu, responden tidak dapat membuktikan bahawa antara 13 Ogos 2014 dan 29 Januari 2016 sebarang keadaan yang menghalang berlaku untuk menyebabkan pemutusan rantaian kausa. Oleh itu, responden berhak menerima yurannya walau tamat tempoh perlantikannya sebagai agen (lihat perenggan 35, 39 & 53(b)–(c)).

(3) Mekanisme urus niaga Plot 5A adalah jualan Plot 5A kepada syarikat usaha sama, Golden Suncity, untuk pertimbangan sebanyak RM467,834,400. Perjanjian hak pembangunan menunjukkan bahawa pertimbangan itu didasarkan pada nilai RM1,200 setiap kaki persegi yang dinisbatkan pada Plot 5A oleh pihak yang berkontrak pada waktu material. Kaedah-Kaedah Penilai, Pentaksir dan Ejen Harta Tanah 1986 di Jadual 7 di bawah tajuk Agensi Harta Tanah memperuntukkan bahawa 'Jualan dan Pembelian' menggambarkan tiga kategori urus niaga, salah satunya adalah 'Yuran bagi perkhidmatan lain seperti usahasama, penjualan syarikat, pertukaran harta, dan lain-lain'. Urus niaga usahasama dalam kes ini jatuh dalam kategori tersebut di mana yuran skala maksimum yang dikenakan sebanyak 3% pada nilai urus niaga (lihat perenggan 45–47).

(4) Pengiraan ganti rugi yang paling sesuai (yuran yang perlu dibayar) kepada perayu ialah RM4,678,344, yang merupakan pilihan yang dikemukakan oleh perayu. Ia berdasarkan yuran profesional sebanyak 1.5% pada 389,862 kaki persegi (ukuran kawasan Plot 5A seperti yang dinyatakan dalam perjanjian hak pembangunan) berdasarkan nilai RM800 satu kaki persegi (lihat perenggan 51–52).

(5) Hakikat bahawa TTDI KL Metropolis Sdn Bhd, dan bukan responden, yang memasuki usaha sama itu tidak menjejaskan tindakan perayu terhadap responden kerana TTDI KL Metropolis Sdn Bhd adalah anak syarikat milik penuh responden. Responden tidak boleh mengambil kesempatan sistem untuk cuba mengalahkan tuntutan pihak yang tidak bersalah dan mengelakkan pembayaran komisen. Adalah tidak munasabah bagi responden menolak untuk membayar yuran perayu (lihat perenggan 50(c)).]

**Notes**

For cases on sale of land, see 3(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 3435–3436.

**Cases referred to**

*Bank of Credit and Commerce International SA (in liquidation) v Ali and others* [2001] 1 All ER 961; [2001] UKHL 8, HL (refd)

*Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597, FC (refd)

*Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, FC (refd)

*Cheng Poh Holdings Sdn Bhd v Ernest Jai Kumar Azad* [2011] 1 LNS 1728, CA (refd)

*Chew Teng Cheong & Anor v Pang Choon Kong* [1981] 1 MLJ 298; [1983] CLJ Rep 86, FC (refd)

*Colliers International (Singapore) Pte Ltd v Senkee Logistics Pte Ltd* [2007] 2 SLR 230, HC (refd)
*Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)
*Glentree Estates Ltd v Gee* (1981) 259 Estates Gazette 332 (refd)
*Green v Bartlett* [1863] 14 CB (NS) 681 (folld)
*Inch Kenneth Kajang Rubber Public Ltd Co v Tor Peng Sie (t/a Pacific Landmark Real Estate Agents)* [2014] 1 MLJ 118; [2014] 2 CLJ 215, CA (refd)
*International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86, FC (refd)
*Ong Kee Ming (t/a FL Development and Property Consultants) v Quek Yong Kang & Anor* [1991] 3 MLJ 294; [1991] SLR 562, HC (refd)
*Tang Chiok Sing v Lian Fatt Sawmill Co* [1976] 2 MLJ 241, FC (folld)
*Wilkinson v Alston* (1879) 48 LJQB 733 (refd)

**Legislation referred to**

Civil Law Act 1956 s 11
Contracts Act 1950 s 24
Evidence Act 1950 s 92
Valuers, Appraisers and Estate Agent Rules 1981 Schedule 7

**Appeal from:** Writ Suit No BA-22NCVC-345–06 of 2016 (High Court, Shah Alam)

*Gopal Sreenevasan (Yap Chin Ling with him) (Song & Partners) for the appellant.*
*V Vijakumar (Dahrick Sivam a/l Balakrishnan with him) (Albar & Partners) for the respondent.*

**Lau Bee Lan JCA:**

INTRODUCTION

**[1]** This is an appeal by the appellant/plaintiff against the decision of the learned High Court judge ('the trial judge') made on 25 April 2018 dismissing its claim against the respondent/defendant with costs of RM35,000 subject to allocator fee.

**[2]** We shall for purposes of this appeal refer to the parties as they were referred to in the High Court. Having heard and considered the respective parties' submissions in this appeal we allowed the appeal. The reasons for our decision are set out below.

BACKGROUND FACTS

**[3]** The plaintiff is a licensed real estate agency providing, among others, services of a real estate agency. The defendant is a property development

company providing, among others, property management services and property management.

**[4]** The plaintiff's claim is for payment of its professional fees for the sum of RM6,237,792 for work done and services rendered to the defendant in relation to the conclusion of a joint venture between the defendant and Hap Seng Land Sdn Bhd ('Hap Seng') for a plot of land known as Plot 5A in a development known as the Kuala Lumpur Metropolis ('KL Metropolis').

**[5]** The 'common chronology of facts' leading to the filing of the plaintiff's claim are as follows:

(a) on or around late 2013, the Chief Executive Officer of the plaintiff, Previndran Singhe ('Previn') (SP5) was approached by the Group Managing Director of the defendant and TTD1 KL Metropolis Sdn Bhd, Sheikh Mohd Faliq bin Sheikh Mohamad Nasimuddin Kamal ('En Faliq') (SP4) to market for the purpose of sale, various plots of development land and en-bloc sale of office buildings within the KL Metropolis;

(b) Previn was told to liaise with the defendant's Chief Operating Officer, Jason Hendroff ('Mr Hendroff') (SD3) on matters relating to various individual plots in KL Metropolis;

(c) Mr Hendroff's email dated 10 December 2013 to Previn, among others, provided the KL Metropolis masterplan to the plaintiff (common core bundle ('CCB')/247–248);

(d) there were subsequent chain of emails following Mr Hendroff's email dated 10 December 2013, namely:

  (i) Previn's email to Mr Hendroff dated 17 December 2013 (CCB/153–156);

  (ii) Previn's email dated 20 December 2013 to one Yuslina Yusof and Mr Hendroff (CCB/152); and

  (iii) Previn's email to Yuslina Yusof copied to Mr Hendroff dated 1 January 2014 (CCB/157–160) attaching Previn's email to Mr Hendroff dated 17 December 2013;

(e) the plaintiff issued their 'letter of appointment dated 3 January 2014' to the defendant for the 'Land and En-Bloc Sales (sic)' of the various plots of component properties within KL Metropolis. The said letter was not executed by the defendant (CCB/71–73);

(f) Mr Hendroff issued an email to Previn dated 3 February 2014 (CCB/78–79) with regard to Plot 1, 2 and 3 of KL Metropolis;

(g) the defendant issued an 'ad-hoc' letter of appointment for one year dated 5 February 2014 to the plaintiff as agent to sell various plots of development land and 'En-Block (sic) Sale' of office buildings within KL Metropolis (CCB/74–77);

(h) Mr Hendroff issued an email to Previn dated 7 February 2014 (CCB/80–81) forwarding the pre-comp with regard to Plots 1, 2 and 3 of KL Metropolis;

(i) Yuslina Yusof issued an email to Previn dated 18 February 2014 on the 'Ad-Hoc' agency of one year with an agency fees of 1.5% (CCB/85–86);

(j) the plaintiff prepared a KL Metropolis Information Memorandum containing the relevant information to be disseminated to potential purchasers/developers etc in respect of KL Metropolis;

(k) Previn issued an email to Mr Hendroff dated 3 March 2014 (CCB/87–88) updating him on the progress of the marketing of the KL Metropolis lands to the various potential purchasers/developers as was set out therein namely, Sunway Bhd, Mah Sing Group Bhd, Ireka Corporation Bhd, UEM Group Bhd, IJM Land Bhd and Hap Seng;

(l) Previn issued an email dated 25 March 2014 to Mr Hendroff on IJM's interest in KLM Plot 1, 2 and 3 (CCB/89);

(m) subsequently, Ahmed Fairuz bin Abdul Aziz ('En Ahmed Fairuz') of the defendant issued an email to Previn dated 16 April 2014 (around 12.22pm) stating 'certain plots ok bro but not prepared to explore the entire project ...' (CCB/90);

(n) Previn issued an email to En Ahmed Fairuz on 16 April 2014 (around 3.19pm) (CCB/90–91);

(o) in early July 2014, Previn was approached by Hap Seng's director, Datuk Edward Lee Ming Foo ('Datuk Edward') (SP6) who expressed an interest to look further into KL Metropolis;

(p) Previn called En Faliq on Hap Seng's interest to discuss the matter and had set up the meeting between Hap Seng and the defendant;

(q) the meeting between Hap Seng and the defendant's representatives took place on 22 July 2014 where Previn and another agent from the plaintiff had also attended;

(r) following from the meeting, Hap Seng had expressed and confirmed their interest in writing via letter dated 8 August 2014 to co-develop Plot 5A of KL Metropolis with the defendant (CCB/92–93);

(s) En Ahmed Fairuz issued an email to Previn dated 12 August 2014 (around 8.10pm) (CCB/95). Previn issued an email to En Ahmed Fairuz on 12 August 2014 (around 5.39pm) (CCB/95–96);

(t) Hap Seng's letter of interest was forwarded to the defendant by the plaintiff via the plaintiff's cover letter dated 8 August 2014 (CCB/94). Previn had sent the letters to En Faliq via email dated 13 August 2014 (CCB/97). There was no acknowledgment of receipt by En Faliq;

(u) nothing transpired further between Hap Seng, the defendant and the plaintiff after the email dated 13 August 2014;

(v) subsequently, approximately one year and five months later, the defendant's subsidiary, TTDI KL Metropolis Sdn Bhd had entered into a shareholders' agreement dated 19 January 2016 with Hap Seng Land Development Sdn Bhd (wholly owned subsidiary of Hap Seng) and Golden Suncity Sdn Bhd. Golden Suncity Sdn Bhd is a joint venture company between TTDI KL Metropolis Sdn Bhd and Hap Seng. TTDI KL Metropolis Sdn Bhd also entered into a development rights agreement dated 29 January 2016 with Golden Suncity Sdn Bhd;

(w) on 24 February 2016, Previn met with the defendant's En Azmi Maulud ('En Azmi') (SD1);

(x) the plaintiff via their solicitors issued a letter of demand to the defendant dated 16 March 2016; and

(y) the defendant via their solicitors issued a letter dated 29 March 2016 denying the appointment of the plaintiff and any amount due and owing to the plaintiff.

THE HIGH COURT

**[6]** The trial judge dismissed the plaintiff's claim primarily on two main grounds:

(a) that the plaintiff was not validly appointed, either expressly or impliedly, as an estate agent by the defendant to sell Plot 5A; and

(b) that the plaintiff was not the effective cause of the sale or that the joint venture to develop Plot 5A did not amount to a sale.

PRIMARY ISSUES ON APPEAL

**[7]** The primary issues in this appeal are:

(a) whether the plaintiff was appointed expressly or by estoppel as agent for Plot 5A or in the alternative, whether the plaintiff was entitled to payment on quantum meruit for services rendered ('Issue 1');

(b) whether the entry of the joint venture to develop Plot 5A either amounted to a sale or that the defendant was estopped by contract and conduct from asserting otherwise ('Issue 2'); and

(c) whether as a matter of evidence the plaintiff was the effective cause of the sale of Plot 5A ('Issue 3').

OUR DECISION

*Issue 1 — Validity of appointment of the plaintiff as agent to sell Plot 5A, whether expressly or by estoppel or payment to the plaintiff on quantum meruit*

**[8]** The learned trial judge found that the letter of appointment dated 3 January 2014 ('LOA1') was unenforceable as it was not signed by the defendant and thus was of the view that the plaintiff could not rely on LOA1 to prove that it was duly appointed by the defendant to be their agent as there was no 'acceptance' on the part of the defendant.

**[9]** Based on the grounds of decision, the learned trial judge found the following of the letter of appointment dated 5 February 2014 ('LOA2'):

(a) it was a valid contract between the plaintiff and the defendant appointing the plaintiff as their agent (para 21);

(b) the appointment was for one year commencing 5 April 2014 to sell the property mentioned in cl C (para 22);

(c) based on the emails between the parties prior to the defendant 'sending' *(sic)* LOA2 and from witnesses' testimony, the appointment of the plaintiff was strictly limited to sell various plots of development land and en-bloc sale of office building within KL Metropolis under Plot 1, 2, 3, 7B1 and 7B2 and did not include Plot 5A (para 24);

(d) LOA2 only mentioned Plot 7B2 and there was no mention of Plot 5A (para 25);

(e) there was no mention of Plot 5A in any correspondences leading up to the issuance of LOA2, namely:

(i) email dated 20 December 2013 from Previn to the defendant: 'The subject of the discussion was 'KLM Marketing and Branding & Plot 7B1 and 7B2. No mention of Plot 5A'.' (para 25);

(ii) email dated 3 February 2014 from the defendant to Previn: '... (O)nly Plot 1, 2 and 3 KL Metropolis were mentioned. Nothing about Plot 5A was mentioned' (para 26);

(f) email dated 16 April 2014 was sent by En Ahmad Fairuz to Previn: 'Again only Plot 1, 2, 3 and 7B1 and 7B2 were mentioned in KL Metropolitan Project. Again, no mention of Plot 5A' (para 27); and

(g) 'Based on the above said evidence, … the ad-hoc appointment was for the sale of the Plot 1, 2, 3 and 7B1 and 7B2. It did not include Plot 5A' para 28).

**[10]** We find the learned trial judge has erred in his conclusion because: (i) on a construction of the contract, there is a concluded contract; and (ii) the parties have conducted themselves as if there was a contract afoot ie a contract by estoppel. Before we delve into the reasons why we say so, it is apposite to refer to some authorities cited by the plaintiff which are applicable and in support of our position.

**[11]** In *Bank of Credit and Commerce International SA (in liquidation) v Ali and others* [2001] 1 All ER 961; [2001] UKHL 8 at para [8] the House of Lords (per Lord Bingham of Cornwall) opined:

> [8] I consider first the proper construction of this release. In construing this provision, as any other contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. *To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified*. The general principles summarised by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society*, *Investors Compensation Scheme Ltd v Hopkin & Sons (a firm)*, *Alford v West Bromwich Building Society*, *Armitage v West Bromwich Building Society* [1998] 1 All ER 98 at 114–115; [1998] 1 WLR 896 at pp 912–913 apply in a case such as this. (Emphasis added.)

Further the House of Lords at para [39] (per Lord Hoffmann) stated, among others:

> But the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage: '… we do not easily accept that people have made linguistic mistakes, particularly in formal documents'. I was certainly not encouraging a trawl through 'background' which could not have made a reasonable person think that the parties must have departed from conventional usage.

The principles therein were approved by the Federal Court in *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 at p 620 para [42]).

**[12]** Regarding 'subsequent actions', the learned author in *Chitty on Contracts* (28th Ed, Vol 1) General Principles at p 639 para 12–124, among others, stated:

A Subsequent actions are therefore inadmissible to interpret a written agreement, although they are admissible to show whether there was a contract and what the terms of the contract were, either originally or by variation, or as the basis for an estoppel.

B **[13]** In *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at p 345, Gopal Sri Ram JCA (as he then was) (delivering the judgement of the Federal Court) at pp 345–346, among others, stated:

C We would add that it is wrong to apply the maxim 'estoppel may be used as a shield but not a sword' as limiting the availability of the doctrine to defendants alone. plaintiffs too may have recourse to it. The true nature of the doctrine *in this context* is that stated by Lord Russell of Killowen in *Dawsons Bank v Nippon Menkwa Kabushiki Kaisha* LR 62 IA 100 at p 108:

D > Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action.

E ...

The width of the doctrine (estoppel) has been summed up by Lord Denning in *Amalgamated Investment case* [1982] 1 QB 84 at p 122; [1981] 3 All ER 577 at p 584; [1981] 3 WLR 565 at p 575 as follows:

F > ... When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands. (Emphasis added.)

G ...

Thus far we have dealt with the operation of the doctrine in the context of there
H having been offered some active encouragement by the party sought to be estopped. But we do not apprehend the law to be different when the encouragement comes in the form of silence. The true principle in such cases is to be found in the following passage in the judgment of Thesiger LJ in *De Bussche v Alt* (1878) 8 Ch D 286 at p 314:

I > If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act.

In *MAA Holdings Sdn Bhd & Anor v Ng Siew Wah & Ors* [1986] 1 MLJ 170, VC George J (now JCA) was faced with a case where the defendant had remained silent while the purchaser had paid moneys to him. Of the defendant's silence, that learned judge said at p 176:

> Having silently stood by and allowed the purchasers to find and pay the balance of the purchase price and then wait for another 38 days before insisting on compliance of the requirement to apply to the FIC although the parties had expressly agreed that whether the FIC approval was obtained or not was not to have any effect on the contract is I think the height of inequity.

**[14]** Reverting to the mainstream, in our judgment the dealing between the plaintiff and the defendant has to be taken in its proper context and in totality against the backdrop of facts which unfolded commencing late 2003 when En Faliq first approached Previn and culminating in the joint venture between Hap Seng and TTDI KL Metropolis Sdn Bhd on 29 January 2016 (see para 5 above and sub-paras thereunder).

**[15]** It is important to observe that LOA1 was titled 'Marketing Appointment For The Sale Of Various Plots Of Development Land And En-Bloc Sale Of Office Buildings (Collectively Referred To As Component Properties) Within KL Metropolis'. It is not disputed that this document was not signed by the defendant. However with respect to the learned trial judge, we are of the view that the lack of acceptance did not detract from the fact there was concluded contract as to the plaintiff's appointment as their agent as our discussion hereafter will reveal.

**[16]** It is noteworthy that prior to the KL Metropolis transaction, the plaintiff had adduced evidence vide Previn that the plaintiff in 2012 acted for the defendant for a land transaction which involved Hap Seng at Lot 212 and Lot 394, Section 63, Town and District of Kuala Lumpur, Wilayah Persekutuan ('Tun Razak transaction'). Datuk Edward confirmed Hap Seng secured the Tun Razak transaction through the plaintiff's services and the modus operandi of the said transaction. We observed for the Tun Razak transaction which the plaintiff had successfully introduced Hap Seng to enter, the transaction similarly involved a letter of appointment dated 12 December 2012 issued by the plaintiff which was also unsigned and Hap Seng issued a letter of interest of even date to the plaintiff. The defendant had settled the plaintiff's professional fees. Since the defendant had by conduct in the Tun Razak transaction recognised the plaintiff's appointment therein, we are of the view the defendant is estopped from denying the plaintiff's appointment in the present case given the similar circumstances as explained. Thus we find the learned trial judge erred in not taking into consideration the facts and evidence which we have alluded to.

**[17]** Turning to LOA2, it is titled 'Appointment As An 'Ad-Hoc' Agent *To Sell Various Plots Of Development Land* & 'En-Block (sic) Sale' of Office Buildings Within KL Metropolis'. LOA2 was signed by Previn acknowledging the plaintiff's acceptance of the terms and conditions therein which included the fee structure which was between 0.5–1.5% depending on the service rendered by the plaintiff.

The first para of LOA2 stated:

> We are pleased to confirm your appointment as an 'Ad-hoc' Agent *to sell various plots of development land*, en-block sale of Tower 1 with two blocks of office buildings and the stratified office within KL Metropolis ('the Properties') on the following salient terms and conditions. (Emphasis added.)

Paragraph C stated:

> C. The Property
>
> *KL METROPOLIS* is a mixed development commercial precinct within KL Metropolis, Kuala Lumpur. This mixed-use landmark development sits on 6 acres of prime land in KL Metropolis and is the luxury development anchored by prime corporate towers, high-end retail outlets, business suites, boutique offices and stratified serviced apartments.
>
> *Plot 7B(2)* is planned for one tower of business suite, one tower of stratified offices and two towers en-bloc offices, as well as retail shoplots at the podium.
>
> This future commercial district of KL METROPOLIS would complement the new MATRADE exhibition centre, the forthcoming KLM Supermall and the new MITI HQ. (Emphasis added.)

We are of the view that the learned trial judge erred in his finding that LOA2 '... only mentioned Plot 7B2. No mention of Plot 5A ...' because he failed to read or consider the document as a whole. Reading the document as a whole, particularly, the title and we stressed on the phrase 'to sell various plots of development land' which phrase is repeated in para 1, one would inevitably conclude that the appointment of the plaintiff under LOA2 is intended to cover various plots of development land in KL Metropolis and the reference to Plot 7B(2) is merely a description of a plot but it did not mean that Plot 7B(2) is the only plot the plaintiff has been retained for.

**[18]** The learned tria judge had referred to two emails dated 20 December 2013 and 3 February 2014 exchanged prior to the execution of LOA2 (see para 9(e)(i) and (ii) above). We agreed with the plaintiff's submission that the learned trial judge erred when he failed to consider there is no reference to specific plots in KL Metropolis including Plot 5A in the correspondence preceding LOA1 and LOA2 as the discussion and scope was at all material

times in relation to KL Metropolis as a whole. For example, the email dated 1 January 2014 and 17 December 2013 exchanged between the plaintiff and the defendant concerned the subject matter 'KLM Branding and Marketing & Plot 7B1 and 7B2' and 'KLM' referred to KL Metropolis which as we alluded earlier consisted of all the various plots therein. This can be gleaned from the evidence of Previn's witness statement Q&A 12.

**[19]** In our judgment the learned trial judge erred when he referred to the email dated 16 April 2014 (see para 9(f) above) in determining whether the plaintiff was appointed as agent to sell KL Metropolis including Plot 5A as any evidence of a subsequent action is inadmissible to interpret a written agreement as explained in *Chitty on Contracts*.

**[20]** Further we observed as pointed out by the plaintiff that after the issuance of LOA1 and LOA2, the email updates given by the plaintiff to the defendant were all in relation to the marketing of KL Metropolis to relevant third parties. In particular the said email dated 3 March 2014 from Previn to Mr Hendroff titled 'Update KL Metropolis Land' wherein Previn had updated Mr Hendroff (the defendant's COO whom Previn was told to liaise with) on the feedback stated:

1. Sunway — Active, waiting for proposal
2. Mah Sing — Declined
3. Ireka — Declined (though I think price will be a motivator for them)
4. Hap Seng — yet to revert
5. UEM — low balling price.

**[21]** In addition we find the learned trial judge erred in not taking into consideration post LOA1 and LOA2 the following emails which clearly depicted that the marketing endeavour was in respect of KL Metropolis as a whole. These are:

(a) email from Previn to Mr Hendroff dated 25 March 2014 with the subject matter 'KL Metropolis' wherein Previn had updated Mr Hendroff on the feedback of IJM Land wherein IJM Land had indicated it was only interested in specific plots but have, among others, also asked for a detailed master plan of KL Metropolis; and

(b) email from Previn to En Ahmed Fairuz dated 16 April 2014 with the subject matter 'KL Metropolis' wherein Previn had informed the defendant that Grocon, an Australian developer, was interested in KL Metropolis.

**[22]** In our judgment the contemporaneous documents read together with

LOA1 and LOA2 clearly demonstrated that the plaintiff's appointment was in relation to KL Metropolis as a whole. Consequently, Plot 5A was clearly a part of the plaintiff's appointment. Previn when cross-examined consistently held the said position. We observed the documents showed that if at all there were specific plots mentioned, it was because the relevant developer had queried on these plots, for eg IJM Land was specifically interested in Plots 1, 2 and 3 of KL Metropolis as per email titled 'KL Metropolis' dated 25 March 2014 from Previn to Mr Hendroff (CCB/89).

**[23]** Even if can be argued that LOA1 and LOA2 did not cover Plot 5A, we observed premised on the email dated 3 March 2014 from Previn to Mr Hendroff (see para 20 above), it was apparent that as of March 2014, the defendant was aware that among other prospects, the plaintiff was also approaching Hap Seng to market KL Metropolis.

**[24]** We find the fact of the plaintiff's appointment was for the whole of the KL Metropolis which included Plot 5A was confirmed in examination-in-chief by En Faliq, the Group Managing Director of the defendant and TTDI KL Metropolis Sdn Bhd, who signed LOA2 on behalf of the latter and which evidence remained unchallenged.

**[25]** Further, Datuk Edward, the group managing director of Hap Seng Consolidated Bhd and director of Hap Seng Land Sdn Bhd (Hap Seng) which is the wholly owned subsidiary of the former testified categorically:

(a) notwithstanding that Hap Seng may have been aware of the existence of Plot 5A previously in 2012, it was Previn who approached him via a direct phone call to consider Plot/Lot 5A which was mentioned in the heading of the letter dated 8 August 2014 which is reproduced for better appreciation:

> Proposed co-development by Hap Seng Land Sdn Bhd or its nominated subsidiaries ('Purchaser') of all that parcel of commercial leasehold land identified as Lot 5A, KL Metropolitan measuring approximately 8.95 acres with an indicative plot ratio of 11:0 ('said Land') from NAZA TTDI Sdn Bhd ('Vendor').

The learned trial judge said in his grounds of decision at para 32 'According to SP6 (Datuk Edward) Hap Seng received information about KL Metropolis project and Plot 15A(sic) from other agents and not from the plaintiff in 2012. It was way before the meeting on 22 July 2014'. Whilst this is true, what the learned trial judge failed to consider is the evidence on what Previn did which resulted in the key meeting of 22 July 2014 and the discussion of the co-development of Plot 5A; and

(b) the said letter from Hap Seng to the defendant referred to a meeting on 22 July 2014 between En Faliq and himself which was arranged by Previn. Other attendees present were Previn, Haridash from the plaintiff and Miss Cheah Yee Leng, Executive Director of Hap Seng Consolidated Bhd.

**[26]** Although the learned trial judge acknowledged that it was the plaintiff who arranged for the meeting, we find the learned trial judge erred in not considering the 8 August 2014 letter. The said letter is significant in that a plain reading of the same revealed:

(a) it made reference to the meeting of the 22 July 2014 testified by Datuk Edward in para 1;

(b) was carbon copied to the plaintiff and for the attention of PW2, Haridash a/l Ramasamy, plaintiff's Head of Mergers & Acquisitions — Development;

(c) it spoke of co-development of Plot/Lot 5A as reflected in the title and the second para which reads 'Subject to our board of directors' approval, we hereby wish to express our interest to co-develop the said land with vacant possession free from all encumbrances, charges, caveats, restraints and from all claims from any third parties but subject to category of land use and to all conditions expressed in the document of title with an indicative plot ratio of 11:0';

(d) that interest to co-develop was conveyed to En Faliq at the 22 July 2014 meeting in para 3; and

(e) pending the finalisation of negotiation Hap Seng requested for certain documents/information in para 4.

**[27]** Following the 8 August 2014 letter from Hap Seng, Previn had vide a letter of even date to the defendant, in para 2 informed the defendant that 'Pursuant to the (22/7/2014) meeting we are pleased to advise that Hap Seng Land Sdn Bhd (Hap Seng) have expressed their interest to jointly develop Plot 5A within KL Metropolis with (the defendant) vide their letter of even date' which the plaintiff enclosed therein. Previn did follow-up with Ahmed Fairuz vide an email dated 12 August 2014 titled 'Re: Letter from Hap Seng — Re Plot 5A' to which Ahmed Fairuz responded vide email of even date and bearing the same title stating '... yes a note to Faliq is fine'. Previn then vide email dated 13 August 2014 to En Faliq forwarded Hap Seng's letter 8 August 2014 asking 'Shall we catch up to discuss this?'.

**[28]** Unfortunately there was no response whatsoever from the defendant for the period post 13 August 2014–29 January 2016. Datuk Edward in cross-examination answered that nothing happened though the Hap Seng's

letter of 8 August 2014 was carbon copied to the plaintiff. We are of the view that nothing turns on this answer by Datuk Edward as the 8 August 2014 letter to the defendant was particularly for the attention of En Faliq whilst Previn on the plaintiff's part had taken positive steps to bring the former's attention to the contents of the said letter with a poser seeking for a discussion.

**[29]** We found it was the defendant who kept the plaintiff out of the negotiations. There was complete silence since the last email dated 13 August 2014 from Previn to En Faliq until the plaintiff discovered of the execution of the shareholders' agreement and the development rights agreement between the parties on the joint venture mentioned in para 5.22 above around 30 January 2016 and 20 February 2016 through business news publications, for eg *The Star Online News* article dated 20 February 2016 with headline 'Naza TTDI signs deal with Hap Seng to develop KL Metropolis'.

**[30]** In light of all the events that transpired, in our judgment the defendant is estopped from denying the plaintiff's appointment as their agent in respect of the Plot 5A transaction albeit a joint venture which we will address later. If indeed the defendant was of the view that the plaintiff's services were no longer required, they would not have relied on the plaintiff's assistance to arrange for the crucial 22 July 2014 meeting or even bother for En Faliq to attend the said meeting. On the other hand, it cannot be denied that the defendant had through the conduct of their officers/representatives represented and/or encouraged the plaintiff to continue to pursue Hap Seng. Hence even if there was no express appointment vide LOA1 and LOA2, we find it would inequitable to deprive the plaintiff of their fees for work done in marketing KL Metropolis and the defendant is thus estopped from doing so as 'subsequent actions' constitute a basis for an estoppel (see *Chitty on Contracts*) and also by the course of conduct adopted by the defendant as aptly described in *Boustead Trading*.

*Issue 3 — Whether plaintiff was the effective cause of the sale of Plot 5A*

**[31]** Having established that it is our finding that there was a contractual relationship between the plaintiff and the defendant, we now turn to the issue whether the plaintiff is the effective cause of the sale of Plot 5A.

**[32]** The learned trial judge correctly stated in para 30 of the grounds of decision that:

> In order for the plaintiff to succeed, the plaintiff is not only required to prove it had been duly appointed, it must also prove that it was the 'effective cause' of the sale of Plot 5A from the defendant to Hap Seng. The effective cause need not be the immediate cause of the transaction.

**[33]** However we are of the considered opinion the learned trial judge fell into error when he held the plaintiff failed to prove that it introduced Hap Seng to the defendant and that the plaintiff's effort was not the effective cause of the 'sale (joint venture to develop) of Plot 5A'. With respect we disagreed with this finding for the following reasons.

**[34]** In determining whether the plaintiff is entitled to their professional fees, we turn to the following authorities:

(a) in the Federal Court case of *Chew Teng Cheong & Anor v Pang Choon Kong* [1981] 1 MLJ 298 at p 298; [1983] CLJ Rep 86 at p 87, Raja Azlan Shah CJ (Malaya) (as His Royal Highness then was) held:

> Where the agency contract provides that the agent earns his remuneration upon bringing about a certain transaction, *he will be entitled to such remuneration if he is the effective, not necessarily the immediate cause of the transaction being brought about. Whether there is a sufficient connection between his act and the ultimate transaction must be ascertained from the facts of the case*. 'The effectiveness of the agent's work is a matter of inference from the evidence' per McGregor J in *Sushames v Cumming* [1962] NZLR 920 at p 925. Where the agent can show that some act of his was the *causa causans* of the transaction (*Tribe v Taylor* [1876] 1 CPD 505 at p 510) or was an efficient cause of the sale (*Miller v Radford* [1903] 19 TLR 575), he is entitled to his agreed remuneration. Both of these cases were approved in the Privy Council in *Burchell v Gowrie and Blockhouse Collieries Limited* [1910] AC 614, which itself is a case where the broker was held entitled to recover because he had brought the company into relation with the actual purchaser, although the company had sold behind his back ... (Emphasis added.)

(b) the Court of Appeal in *Inch Kenneth Kajang Rubber Public Ltd Co v Tor Peng Sie (t/a Pacific Landmark Real Estate Agents)* [2014] 1 MLJ 118; [2014] 2 CLJ 215 at para [29] referred to *Chew Teng Cheong* and held for an agent to be entitled to their fees, they are required to show they are the effective cause in bringing the parties together;

(c) a similar approach of effective cause and that the chain of causation was not broken was adopted by the Singapore Courts for eg in:

(i) in *Ong Kee Ming (t/a FL Development and Property Consultants) v Quek Yong Kang & Anor* [1991] 3 MLJ 294; [1991] SLR 562, the High Court held that an agent was entitled to his commission even after the lapse of his appointment as he was, on the evidence, the effective cause of the ultimate sale. Chan Sek Keong J referred to the cases of *Wilkinson v Alston* (1879) 48 LJQB 733 (at p 565), *Glentree Estates Ltd v Gee* (1981) 259 Estates Gazette 332 (at pp 565–566) and *Green v Bartlett* [1863] 14 CB (NS) 681 at p 565 G–H); and

(ii) *Colliers International (Singapore) Pte Ltd v Senkee Logistics Pte Ltd*

A [2007] 2 SLR 230 (HC) at p 245 paras [51]–[52].

**[35]** Upon consideration of all the facts and evidence and the contemporaneous documents alluded to in paras 25–30 above, in our judgment the plaintiff has proved on a balance of probabilities that they are the B effective cause of the transaction. If the defendant alleged that there is another effective cause, then the onus of proof is on them to prove the same (see *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86 at p 87 C–F right column). However as the evidence disclosed between *13 August–29 January 2014*, the C defendant could not prove any intervening event had occurred as to cause a break in the chain of causation.

**[36]** In *Cheng Poh Holdings Sdn Bhd v Ernest Jai Kumar Azad* [2011] 1 LNS 1728, the Court of Appeal had in essence held notwithstanding a transaction D document was executed after the expiry of the agent's mandate, the agent would still be entitled to fees if they were the effective cause of the transaction. In arriving at its decision, the Court of Appeal referred to *Chew Teng Cheong*, *Ong Kee Ming* and *Green v Bartlett* [1863] 14 CB (NS) 681 which was referred in both the two former cases.

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**[37]** In *Green v Bartlett*, G, an auctioneer and estate agent, was instructed by B to sell an island by auction or otherwise. G put the island up for auction but the reserved price was not reached. Afterwards, T, who had attended the auction, asked G for and was given B's name. T then approached B direct to F negotiate the purchase of the island. Before the eventual sale, B terminated G's authority to sell. The court held that G was the *causa causans* of the sale and was entitled to the commission.

**[38]** In the present case, the defendant argued that the plaintiff was not the G 'effective nor immediate cause of the transaction being brought about' as there were no further discussions from 22 July 2014 until January 2016, the plaintiff's appointment had expired on or before February 2015 which was before the development rights agreement dated 29 January 2016 entered between TTDI KL Metropolis and Golden Suncity Sdn Bhd and there was a H break in the purported appointment.

**[39]** With respect we find there are no merits in the defendant's submission. We adopt what we have stated in paras 25–30 and 34 and the sub-paras thereunder on the sequence of events that transpired prior to and post 22 July I 2014 meeting and the plaintiff's involvement and the defendant's conduct throughout till 13 August 2014 and thereafter till 29 January 2016 of the fact that there was complete silence from the defendant. Applying the principle in *Green v Bartlett*, we are of the view that the plaintiff is entitled to their fees notwithstanding the expiry of the period of the appointment under LOA2 and

whether or not the subsequent discussions between Hap Seng and the defendant had stalled and had purportedly revived later, these do not constitute a break in the chain of causation. Further based on the preceding authorities cited, what is material is whether on the facts and evidence, the plaintiff was the effective cause of the transaction which we answer in the affirmative.

**[40]** The defendant argued that that the 8 August 2014 letter sent by the plaintiff to the defendant was an afterthought to vary the terms of LOA1 and LOA2 when the plaintiff had discovered about Plot 5A for the first time in the meeting on 22 July 2014. With respect in our considered opinion there is no variation and s 92 of the Evidence Act 1950 does not apply for the following reasons:

(a) firstly, what Previn did in the 8 August 2014 letter was to merely state:

  (i) in para 1, what was discussed at the 22 July 2014 meeting ie 'the possible joint development of Plot 5A within the KL Metropolis' and the persons at the said meeting;

  (ii) the contents of para 2 appears in para 27 above; and

  (iii) in para 3, the plaintiff requested for a date to discuss on the land value and the main commercial terms;

(b) secondly, it is absurd to contend there is variation given that all along it has been the plaintiff's stand that LOA1 and LOA2 dealt with development land in KL Metropolis which encompassed various plots of land, including Plot 5A for the reasons explained in paras 14–22 above.

*Issue 2 — Whether the joint venture was a sale or defendant was estopped by contract and conduct*

**[41]** The defendant argued the plaintiff had attempted to introduce a joint venture which was an unpleaded issue and therefore the plaintiff should be estopped from introducing oral evidence of the joint venture, interest paid on the joint venture, delivery of vacant possession, transfer of land and sale of interest.

**[42]** In our judgment, the aforesaid pleading issue is totally unfounded as the 'joint venture' is undoubtedly pleaded in para 9 of the statement of claim as follows:

> 9. Through the marketing efforts of the Plaintiff, the director of Hap Seng, one Datuk Edward Lee Ming Foo ('Datuk Edward') had contacted the plaintiff's Chief Executive Officer, one Mr Previndran Singhe ('Mr Previn') to express Hap Seng's interest in Plot 5A. The Plaintiff then notified the Defendant's En Faliq of Hap Seng's interest and upon the Defendant's confirmation of En Faliq's available dates, Mr Previn proceeded to set up and facilitate a meeting between Datuk Edward and

> En Faliq, which took place on 22.7.2014. *This was followed by a letter dated 8.8.2014 issued by Hap Seng in which they had expressed and confirmed their interest in writing to co-develop Plot 5A with the Defendant* ('Joint Venture'). This letter from Hap Seng (that was copied to the Plaintiff) was given directly to the Plaintiff by Hap Seng, whereby the Plaintiff had thereafter forwarded the same to En Faliq, as an attachment in the Plaintiff's letter also dated 8.8.2014. (Emphasis added.)

**[43]** The defendant submitted: (i) the concluded transaction was not a sale and purchase of land and buildings but it was a joint venture; and (ii) the plaintiff was not entitled to any professional fees under the Valuers, Appraisers and Estate Agent Rules 1981 ('the VAEAR 1981') because the purported appointment was only of sale of land and buildings and not for joint venture.

**[44]** The defendant further submitted the learned trial judge was correct when he held:

> (T)hat Plot 5A was never sold to Hap Seng. What happened was that Hap Seng Land Development Sdn Bhd, TTDI KL Metropolis Sdn Bhd and Golden Suncity Sdn Bhd entered into Shareholders agreement dated 29-1-2016 to form a joint venture company named Golden Suncity Sdn Bhd (JV Company) to develop Plot 5A. Simultaneously a Development Rights Agreement dated 29-1-2016 was entered between TTDI KL Metropolis Sdn Bhd and the JV Company giving the JV Company Exclusive Development Rights to develop Plot 15A.

**[45]** With respect we are of the view that the defendant's submission above is flawed for the following reasons:

(a) the mechanics of the Plot 5A transaction was a sale of Plot 5A to the joint venture company, Golden Suncity Sdn Bhd. In this regard we agreed with the plaintiff's submission that:

  (i) the Plot 5A transaction in question also involves a consideration sum in Plot 5A as well as a delivery of possession of Plot 5A from the owner to be paid by the relevant party (in this scenario, the joint venture company) and a transfer of interest TTDI KL Metropolis Sdn Bhd to the joint venture company; and

  (ii) the requisite consideration sum to be paid by the joint venture company is RM467,834,400 as was defined and set out in the said development rights agreement which was/is based upon the value ascribed to the Plot 5A land by the contracting parties at the material time of RM1,200 per square foot. As such, the consideration sum for the transfer of interest (as in a 'sale') to the joint venture company of the transaction herein is RM467,834,400.

**[46]** Furthermore Schedule 7 of the VAEAR 1981 under the heading 'C

Estate Agency' provides:

1. *Sale or Purchase*

(a) Land and Buildings

Maximum fee of 3%

(b) *Fees for other services such as joint venture, sale of company, property swaps*, etc.

Maximum fee of 3%

(c) Chattels including plant and machinery

10% of the proceeds. (Emphasis added.)

**[47]** Reading the abovesaid provision, we are of the considered opinion that the term 'Sale and Purchase' envisages three categories of transactions ie (a), (b) and (c) as listed above. In the context of the present case, the joint venture transaction falls within the ambit of category (b) as emboldened above where the maximum scale of fee chargeable is 3% on the value of the transaction.

**[48]** Encik azmi, the defendant's group legal head admitted that the KL Metropolis lands could not be sold to third parties in an outright sale and purchase scenario as they would be prevented from transferring/ registering the title to a third party due to certain restrictions. The fact of such restriction is evident when the defendant had relied on a letter from the 'Pentadbir Tanah' dated 31 October 2014 in respect of another transaction of another plot in KL Metropolis (CCB/161).

**[49]** Hence it is not surprising that the mechanics of the joint venture between Hap Seng and the defendant had to take the form and manner as encapsulated in the shareholders' agreement and development rights agreement mentioned in para 5.22 above. Seen in this context, we are of the view that the argument of the defendant that LOA1 and LOA2 are void under s 24 of the Contracts Act 1950 is irrelevant.

**[50]** Further the defendant submitted that they are not liable for the fees as the joint venture transaction was between TTDI KL Metropolis Sdn Bhd and Golden Suncity Sdn Bhd whilst the plaintiff and the defendant were not parties to the joint venture. We find the defendant's submission has no merit. Our reasons are these:

(a) in *Tang Chiok Sing v Lian Fatt Sawmill Co* [1976] 2 MLJ 241, the facts as per headnotes: The appellants had claimed commission against the respondents under an agreement by which the respondents agreed to pay the appellant commission, entertainment and service fees if the appellant was successful in getting a Korean concern, Shin Fung (Borneo) Co to

enter into a contract to extract and purchase timber from a concession area. The respondent firm had become defunct and the partners of the firm incorporated a limited company, the Lian Fatt Sawmill Co Ltd to work in the concession area. Forest licences which had been issued to the firm were renewed in the name of the company. The company entered into the agreement with the Korean concern for the extraction and sale of timber in the concession area. The appellant claimed commission under the agreement with the firm. His claim was dismissed in the High Court and he appealed to the Federal Court;

(b) the Federal Court held:

(1) once the appellant had brought the parties together he was entitled to his commission and it did not matter that in fact the Korean concern made the contract with the limited company and not the firm as the persons in control of the partnership and the limited company were the same;

(2) the respondents were taking advantage of a device to try to evade payment of commission. Such a device should not be allowed to defeat the claim of an innocent party. Under the circumstances it would be inequitable for the partnership to refuse to pay commission.

(c) in the present case in our considered opinion even though the party which entered the Plot 5A transaction vide the shareholders' agreement and the development rights agreement was TTDI KL Metropolis Sdn Bhd and not the defendant, this does not vitiate the plaintiff's cause of action against the defendant in view that TTDI KL Metropolis Sdn Bhd is a wholly owned subsidiary of the defendant. Following the decision of the Federal Court in *Tang Chiok Sing*, we find the defendant is taking advantage of a device to try to evade payment of commission. Such a device should not be allowed to defeat the claim of an innocent party. It should be borne in mind that the transaction between the plaintiff and defendant involved about RM1/2 billion. It is unthinkable to the point of absurdity that anyone would have rendered the services for free. Under the circumstances, it would be inequitable for the defendant to refuse to pay the fees of the plaintiff.

DAMAGES

**[51]** The plaintiff submitted the following computations, marked as R1:

*Based on Actual Joint Venture Value (A)*

(a) Professional Fees at 1.5%
RM467,834,400.00 x *1.5%* = *RM7,017,516.00*

(b) Professional Fees at 2%
RM467,834,400.00 x *2%* = *RM9,356,688.00*

*Based on 70% of Actual Joint Venture Value (B)*

(a) Professional Fees at 1.5%
(RM467,834,400.00 x 70%) x *1.5% = RM4,912,261.20*

(b) Professional Fees at 2%
(RM467,834,400.00 x 70%) x *2% = RM6,549,681.60*

Note: In (A) and (B), the figure of RM467,834,400.00 is based on the definition of 'Consideration Sum' in Development Rights Agreement.

*Based on a Value at RM800 per square foot (C)*

(a) *Professional Fees at 1.5%*
RM800 per sq. foot x 389,862 sq. feet = RM311,889,600.00 Professional Fees (ie *1.5%* of RM311,889,600)= *RM4,678,344.00*

(b) Professional Fees at 2%
RM800 per sq. foot x 389,862 sq. feet = RM311,889,600.00
Professional Fees (ie *2%* of RM311,889,600)= *RM6,237,792.00*.

**[52]** In the development rights agreement, recital A, Plot 5A area measurement is 389,862 sqft (ie 8.92 acres), scale of professional. We held the view that the most appropriate computation of damages (fees due) to be awarded to the plaintiff is the amount of RM4,678,344 claimed in para C(a) of R1 which was the preferred option submitted by the learned counsel for the plaintiff.

## CONCLUSION

**[53]** For the foregoing reasons discussed above our findings are:

(a) Issue 1 — the plaintiff was appointed expressly or through estoppel to market KL Metropolis which included Plot 5A;

(b) Issue 3 — the plaintiff was the effective cause in bringing the defendant and Hap Seng together in the Plot 5A transaction and of the sale of Plot 5A and there was no break in the chain of causation; and

(c) Issue 2 — the entry of the joint venture to develop Plot 5A amounted to a sale. In any event the defendant was estopped by contract and conduct from asserting otherwise.

**[54]** We concluded that the learned trial judge had erred in his findings in respect of Issues 1, 2 and 3 and there are merits in the appeal which warranted appellate intervention (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 at p 10; [2004] 4 CLJ 309 at p 320 (FC)). We unanimously allowed the appeal and made the following order:

(a) allowed the plaintiff's claim in the sum of RM4,678,344 as per the calculation in para (C)(a) of R1;

A (b) allowed plaintiff's claim for interest on the sum of RM4,678,344 pursuant to s 11 of the Civil Law Act 1956 at the rate of 5%pa from the date of judgment until the date of full and final settlement;

(c) set aside the High Court's decision of 25 April 2018; and

B (d) awarded agreed costs of RM35,000 (High Court) and RM20,000 (Court of Appeal) to be paid to the plaintiff subject to allocator.

*Order accordingly.*

C Reported by Ashok Kumar

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